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No. 06-8120

# In the Supreme Court of the United States

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BRUCE EDWARD BRENDLIN, PETITIONER,

*v.*

STATE OF CALIFORNIA, RESPONDENT.

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**On Writ of Certiorari**
**to the California Supreme Court**

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## BRIEF FOR WAYNE COUNTY, MICHIGAN IN SUPPORT OF RESPONDENT

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## Statement of Questions Presented for Review

**I.**

Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop; further, even if the passenger *is* detained, whether the arrest and search incident arrest of the passenger results from an exploitation of that "illegality" where the passenger is arrested or an outstanding arrest warrant.

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## Interest of the Amicus

*Amicus* is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as the issue involved here has arisen a number of times in Wayne County cases.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

## Statement of The Case

Amicus joins the statement of case of the State of California, Respondent.

## Argument

### A. Introduction

Petitioner was a passenger in an automobile. That automobile had a temporary registration affixed to the rear window. Because the officer could not make out the date of expiration on the temporary permit, he pulled the vehicle over. He recognized defendant as a parole absconder—there was a "no bail" arrest warrant out for petitioner—and petitioner was arrested. A search of his person revealed an orange syringe cap; paraphernalia and narcotics were found on the person of the driver, materials used in manufacturing methamphetamine were found in the back seat. Reversing the California Court of Appeals, the California Supreme Court held that the traffic stop of the vehicle accomplished by the police, directed as it was to the driver of the vehicle, did not constitute a Fourth Amendment seizure of the person of petitioner, who had, at the time of the stop, neither the ability to acquiesce to or resist the show of authority of the police. But until the police direct a show of authority specifically to the passenger, such as by directing that he or she alight from the vehicle, no seizure of the passenger has occurred.[1]

Much has been written regarding the seizure question, and amicus will not belabor the point. This Court has said that the very definition of a "seizure" "requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking. ... but the detention or taking itself must be willful."[2] In circumstances such as those in the present case, the passenger of the auto is not the "object of the detention or taking," and his or her seizure is not intentional—it is the

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1. *People v. Brendlin* 38 Cal.4th 1107, 1122, 136 P.3d 845 (Cal. 2006).

2. *Brower v. County of Inyo.* 489 U.S. 593, *96, 109 S.Ct. 1378, 1381, 103 L Ed 2d 608 (1989).

driver to whom the show of authority is directed—but *incidental*. The California Supreme Court is correct—until a show of authority is directed to the passenger, to which he or she acquiesces, no Fourth Amendment seizure of the passenger has occurred. But what if a seizure *is* said to occur, where there also exists an outstanding arrest warrant for the seizure of the person of the passenger? Can that person be heard to complain?

**B. Even Where an Improper Vehicle Stop Occurs, Where an Occupant Is Arrested on the Basis of a Valid Outstanding Warrant There Has Been No Exploitation of the "Primary Illegality," and the Arrest and Search Incident to Arrest Are Valid.**

It is now clear beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, rather the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[3] The purpose of the rule, then, is not to repair, but to deter. It carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and is thus not to be applied "unthinkingly."

That "but for" causation is a *necessary* ***but not sufficient*** element of a claim that evidence should be excluded as a result of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth

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3. See e.g. *United States* v *Calandra*, 414 US 338, 94 S Ct 613, 38 L Ed 2d 561 (1974). See also *Stone* v *Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976); *United States* v *Leon*, 468 US 1032, 104 S Ct 3479, 82 L Ed 2d 778 (1984); *Hudson* v *Michigan*, __US__, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006).

Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation."[4] But absent a causal connection between the improper police conduct and the evidence or contraband discovered, the exclusionary rule has no place.[5] Further in some situations, *despite* "but for" causation the rule is not applied because its cost is too high when weighed against its benefits. One of the circumstances where exclusion will not result even if, in some sense, "but/for" causation is shown, is that of "purged taint," also known as attenuation; that is, where the evidence is not come at by exploitation of the "primary illegality."

This doctrine came to full flower in *Wong Sun* v *United States*.[6] Essentially, an informant who was a "first time" informant with no record of reliability, told federal agents that he had purchased heroin the night before from an individual known to him only as "Blackie Toy," who was the proprietor of a laundry on a particular thirty block street. The agents went to the laundry without an arrest or search warrant, and when Toy answered the door an agent said he had come for his laundry. When Toy began to close the door, the agent identified himself, and Toy slammed the door and ran. The agents broke open the door and arrested Toy in his bedroom, and he gave information leading to another person, who gave up tubes of heroin. Toy also led the agents to the living quarters of Wong Sun, who was arrested and ultimately made incriminating statements. Before this Court were the admissibility of Toy's admissions in his bedroom, the admissibility of the heroin turned over by the third party who

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4. 6 LaFave, *Search and Seizure* (3rd Ed.), §11.4

5. See *Hudson v Michigan, supra.*

6. *Wong Sun* v *United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

was discovered through Toy's admissions, the admissibility of Wong Sun's confession which was made several days after his arrest and release on recognizance; and the admissibility of the heroin turned over by the third party against Wong Sun.

The majority found that the agents lacked probable cause for the arrest of Toy, arising either from the information given them by the informant, or in combination with Toy's response to their presence at the laundry. Because the arrest without probable cause was unlawful, so was the entry to achieve it. The statements of Toy were excludable as the fruit of the illegal arrest, held the Court, as under the circumstances they were not the result of an intervening act of free will. The statements led the agents to a third party, Yee, who turned over heroin, and it was clear that the heroin would not have been obtained from Yee absent Toy's statements. The Court stated that the test for exclusion is *not* whether "but for" the improper conduct the challenged evidence would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality...."[7] The heroin turned over by Yee met that test, and was thus inadmissible. Wong Sun's arrest was also held to be without probable cause by the lower court, but the Court found no reason to address that question, because "no evidentiary consequences" turned upon it. Wong Sun's confession was not the fruit of his arrest, in that he gave it voluntarily several days after he had been arraigned and released on his own recognizance. The Court thus found that the "connection between the arrest and the statement had 'become so attenuated as to dissipate the taint,'" though clearly in a "but for" sense it was the fruit of the illegal arrest. Plainly, then, the Court rejected the "but for" test. Though the heroin surrendered by Yee was inadmissible against Toy because the result of Toy's improperly gained statements, this result did not obtain with respect to Wong Sun, as he had no standing to claim it.

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7. *Wong Sun*, at 455.

*Wong Sun* teaches that evidence which is discovered as the result of improper police conduct is not necessarily excludable, for the exclusionary rule is not to be applied on a strict "but for" or "cause and effect" basis. The "fruit of the poisonous tree" must be excluded—there must be a "but for" causation demonstrated—but it is not true that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, the question instead being in each case whether the evidence gained was "come at by *exploitation of the primary illegality*." Where the causal connection is attenuated, or the "taint" somehow "purged," exclusion will not result.

*Johnson* v *Louisiana*[8] is also particularly instructive. The defendant claimed that his arrest in the nighttime without warrant was invalid without some showing of exigent circumstances. The Supreme Court, however, declined to discuss whether the arrest was illegal, because even assuming that it was no exclusionary remedy would result. The defendant sought to have his lineup identification excluded as a fruit of the arrest. But the Court found that the lineup identification was not a fruit of the arrest under *Wong Sun*. Certainly "but for" the arrest the lineup would not have occurred; however, before the lineup he was *arraigned*, and bail set. At the time of the lineup, then, his custody was not pursuant to the arrest, but to the *commitment of the arraigning magistrate*. Under these circumstances, held the Court, it could not be said that the lineup was the result of "exploitation" of the challenged arrest, but rather resulted from "means sufficiently distinguishable to be purged of the primary taint." This is very similar to the present case, where the search of the auto occurred not incident the stop of the defendant, but incident his valid arrest on an outstanding warrant.

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8. *Johnson* v *Louisiana*, 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620 (1972). See also *United States* v *Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054 (1978).

Application of this principle to the present circumstances reveals that *even if* petitioner is said to be "seized" at the moment the driver of the vehicle acquiesced to the show of authority of the police, the seizure of his person and the search incident that seizure are not the result of any "exploitation" of that "primary illegality," but the result of his valid arrest on an outstanding warrant. It must be remembered that petitioner was illegally *at large* at the time of his seizure, his seizure being justified not only by probable cause, but by a warrant issued by a magistrate.

Demonstrating the point is *People v Lambert*.[9] Sheriff's deputies responded to a silent alarm from a garage. They discovered that the garage had been broken into and that one or more all-terrain vehicles may have been removed. They left the scene and drove north, looking for evidence of the vehicles, and within a short time saw a van traveling south, which they determined to stop the van to see if the occupants had seen anyone in the area. When the deputies made a U-turn to proceed in the direction of the van to accomplish the stop, the van accelerated. A pursuit ensued, and the deputies activated their overhead lights and the van pulled over. Only after the van had been stopped did one of the deputies recognize the driver, whom he knew was the subject of outstanding warrants.

The defendant was arrested on the warrants, and while in the patrol car admitted that he had broken into the garage and that items stolen from the garage were in the back of the van. A deputy advised defendant of his Miranda rights, after which defendant again confessed, also giving the deputy permission to search the van. That search revealed fruits of the crime.

The Michigan Court of Appeals found that the stop of the van was not justified by reasonable suspicion or probable

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9. *People* v *Lambert*, 174 Mich App 610, 436 N.W. 2d 699 (1989)

cause, and was thus unconstitutional. But, said the court, this was not the end of the matter:

> When a defendant claims that physical evidence should be suppressed as a result of an unlawful seizure of his person, the appropriate inquiry is whether that evidence was procured by an exploitation of the illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint....This is not a "but for" test, but rather depends on whether there has been an exploitation of the primary illegality.[10]

The court found that the evidence was admissible despite the initial impropriety of the police:

- Here, the unlawful stop produced defendant and his vehicle.

- However, the physical evidence obtained resulted from the fact that one of the deputies immediately recognized defendant as being the subject of outstanding bench warrants. Defendant's lawful arrest and all the evidence obtained resulted from that identification.

- Under the circumstances of this case, it was not reasonably foreseeable for the deputies to believe that they would be able to recognize the driver of the vehicle as being the subject of outstanding bench warrants at the time they made the stop.

- There was no exploitation of the primary illegality and, hence, the "fruit of the poisonous tree" doctrine was inapplicable.

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10. *Lambert*. at 703.

- We conclude ... that where the police have unlawfully stopped or detained a citizen and then discover that the person detained is the proper subject of a lawful arrest on grounds other than the original illegal stop, the police may make the arrest *and any evidence obtained as a result of the lawful arrest is admissible*.[11]

Also informative is the Louisiana case of *State v Hill*.[12] The defendant was stopped on the street without reasonable suspicion. During his detention, a computer check revealed that he had two outstanding arrest warrants, and a search incident to his arrest under those warrants revealed that he was in possession of a crack pipe with cocaine residue. The Louisiana Supreme Court noted that no evidence was discovered as the result of the improper stop, but only the outstanding arrest warrants. The court found that the evidence seized was not suppressible, as the arrest on the warrants "constituted an intervening circumstance" and dissipated the taint of the "initial impermissible encounter."[13]

Similarly, in the Texas case of *Brooks v State*[14] the defendant was stopped without reasonable suspicion, and arrested when a computer check showed outstanding warrants. An examination of the VIN of his vehicle preparatory to its impoundment revealed that it was stolen. The court concluded that "even in a situation involving an

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11. *Lambert*, at 703.

12. *State v Hill*, 725 So 2d 1282 (La, 1998).

13. *Hill*, at 1284-1285. See also *State v Marin*, 806 So 2d 894 (La App, 2002), reaching the same result on indistinguishable facts (an invalid stop, discovery of outstanding warrants through a computer check, an arrest and discovery of contraband incident that arrest).

14. *Brooks v State*, 830 SW2d 817 (Texas App, 1992).

illegal detention, where a valid warrant for the (defendant's) arrest is discovered, and the (defendant) is arrested under the authority of that warrant, evidence found during a subsequent inventory search pursuant to the arrest is admissible into evidence...."[15]

**C. Conclusion**

If an improper stop of the vehicle, followed by an arrest of the driver based on an outstanding warrant, results in a finding that the arrest is proper and any evidentiary fruits flow from the proper arrest and not the improper initial stop, no different rule should obtain for a passenger, even assuming for the sake of argument that the passenger may be viewed as "seized" when the driver pulls over. Petitioner here was at large in the community with a valid warrant for his arrest outstanding. The matter is akin almost to that of standing; that is, where the seizure of one's person is justified by warrant, one should not be heard to complain—the law should set its face against such a complaint—even if the police make an initial seizure unjustified by the law, for as an objective matter the seizure of the person was not only justified, but commanded by appropriate authority. Even if petitioner was initially improperly seized, he was then arrested based on an outstanding warrant, an intervening circumstance dissipating any taint from the initial improper stop. Unless exclusion is to occur on a but-for basis, the arrest of the petitioner and the search incident arrest were justified by the warrant, and suppression is inappropriate.

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15. *Brooks*, at 821. So also in *Reed v State*, 809 SW2d 940 (Texas App, 1991), on indistinguishable facts.

**Relief**

Wherefore, amicus submits that the California Supreme Court should be affirmed.

Respectfully submitted,

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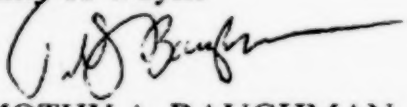

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